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7 TIMOTHY D. WILKINS,
8 Plaintiff,
9 v.
10 B. BAKER, et al.,
11 Defendants.

Case No. [23-cv-01387-HSG](#)

**ORDER DISMISSING AMENDED
COMPLAINT WITH LEAVE TO
AMEND**

Re: Dkt. No. 10

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13 Plaintiff has filed a *pro se* action pursuant to 42 U.S.C. § 1983. His amended complaint
14 (Dkt. No. 10) is before the Court for review under 28 U.S.C. § 1915A.

15 **DISCUSSION**

16 **A. Standard of Review**

17 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
18 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.
19 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims
20 that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek
21 monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),
22 (2). *Pro se* pleadings must, however, be liberally construed. *See United States v. Qazi*, 975 F.3d
23 989, 993 (9th Cir. 2020).

24 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
25 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Specific facts are not
26 necessary; the statement need only “give the defendant fair notice of what the . . . claim is and the
27 grounds upon which it rests.”” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted).
28 While Rule 8 does not require detailed factual allegations, it demands more than an unadorned,

1 the-defendant-unlawfully-harmed-me accusation. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009).
2 A pleading that offers only labels and conclusions, or a formulaic recitation of the elements of a
3 cause of action, or naked assertions devoid of further factual enhancement does not suffice. *Id.*
4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a
5 right secured by the Constitution or laws of the United States was violated, and (2) that the alleged
6 violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487
7 U.S. 42, 48 (1988).

8 **B. Procedural Background**

9 The initial complaint alleged that Plaintiff filed a grievance regarding his housing
10 placement, and that on October 3, 2022, defendant SQSP correctional sergeant B. Baker retaliated
11 against him for filing the grievance by issuing him a rules violation report, in violation of the First
12 Amendment prohibition on retaliation for exercising protected conduct. *See generally* Dkt. No. 1.
13 The Court dismissed the complaint with leave to amend because it only proffered a conclusory
14 assertion without factual enhancement. Dkt. No. 8.

15 **C. Amended Complaint**

16 The amended complaint names as defendants M. Gaitan, L.V. Perez, E. Cabrera, Wright,
17 Stribling, T. Gourdine, and B. Baker. The amended complaint makes the following allegations.

18 On September 14, 2022, at intake, Plaintiff informed defendant Gaitan that he was not gay.
19 Defendant Gaitan housed Plaintiff with a gay inmate because he could tell that homosexuality
20 made Plaintiff uncomfortable. After Plaintiff discovered that he was housed with a gay inmate,
21 Plaintiff asked defendants Cabrera, Wright, Stribling, and Gourdine why he was housed with a gay
22 inmate. Defendant Wright responded that Plaintiff required a bottom bunk so they got him one,
23 and defendant Gourdine told Plaintiff that if he didn't like his current housing, he should find a
24 new cell. On September 16, 2022, Plaintiff filed a grievance about his housing placement. After
25 filing the grievance, Plaintiff noticed non-party sergeant Perez and other guards laughing at him
26 on different occasions as he passed the guards' desk, and sergeant Perez laughed at him on
27 September 22, 2022, when Plaintiff returned from committee, where his request for restoration of
28 single-cell status was denied. Plaintiff alleges that sergeant Perez and the guards were laughing as

1 if they found it funny that Plaintiff was forced to remain housed with a gay inmate. Plaintiff was
2 “eventually housed in his own living quarters on September 22, 2022, but only after he committed
3 a rule violation in an effort to keep himself safe.” Dkt. No. 10 at 5. On October 3, 2022,
4 defendant Baker retaliated against Plaintiff for filing a grievance about his housing placement by
5 issuing him a rules violation report for his behavior on September 22, 2022.

6 The amended complaint alleges that defendants Gaitan, Perez, Cabrera, Wright, Stribling,
7 and Gourdine were deliberately indifferent to Plaintiff’s personal safety, in violation of the Eighth
8 Amendment; and that defendant Baker retaliated against him for filing a grievance regarding his
9 housing placement, in violation of the First Amendment.

10 The amended complaint is DISMISSED for failure to state a claim for the following
11 reasons.

12 The amended complaint fails to state an Eighth Amendment claim against defendants
13 Gaitan, Perez, Cabrera, Wright, Stribling, and Gourdine because it is unclear how being housed
14 with a gay inmate exposed Plaintiff to an excessive risk to his safety. The Eighth Amendment
15 requires that prison officials take reasonable measures to guarantee the safety of prisoners.
16 *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The failure of prison officials to protect inmates
17 from dangerous conditions at the prison violates the Eighth Amendment when two requirements
18 are met: (1) the deprivation alleged is, objectively, sufficiently serious; and (2) the prison official
19 is, subjectively, deliberately indifferent to inmate health or safety. *Farmer*, 511 U.S. at 834. A
20 prison official is deliberately indifferent if he knows of and disregards an excessive risk to inmate
21 health or safety by failing to take reasonable steps to abate it. *Id.* at 837. The amended complaint
22 does not identify how being housed with a gay inmate constituted an excessive risk to Plaintiff’s
23 safety. This Eighth Amendment claim is DISMISSED with leave to amend to correct the
24 identified deficiency, if Plaintiff can truthfully do so.

25 The amended complaint fails to state a First Amendment retaliation claim against
26 defendant Baker. In the amended complaint, Plaintiff acknowledges committing the rules
27 violation that is the subject of the RVR issued by defendant Baker on October 3, 2022, and states
28 that he deliberately committed a rules violation in order to obtain single cell status. This statement

1 contradicts the allegation that defendant Baker falsely issued the RVR in retaliation for Plaintiff's
2 protected conduct. The First Amendment retaliation claim against defendant Baker is therefore
3 DISMISSED with prejudice. *See Airs Aromatics, LLC v. Victoria's Secret Stores Brand Mgmt, Inc.*, 744 F.3d 595, 600 (9th Cir. 2014) ("A party cannot amend pleadings to directly contradic[t] an earlier assertion made in the same proceedings.") (internal quotation marks and citation
4 omitted).
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7 CONCLUSION

8 For the reasons set forth above, the Court orders as follows.

9 1. The Court DISMISSES the First Amendment claim against defendant Baker with
10 prejudice; DISMISSES defendant Baker from this action; and DISMISSES with leave to amend
11 the Eighth Amendment claim against Gaitan, Perez, Cabrera, Wright, Stribling, and Gourdine.

12 2. Within twenty-eight (28) days of the date of this order, Plaintiff shall file a second
13 amended complaint that addresses the identified deficiency in the Eighth Amendment claim.
14 Plaintiff may not raise new claims in the second amended complaint. The second amended
15 complaint must include the caption and civil case number used in this order, Case No. C 23-01387
16 HSG (PR) and the words "SECOND AMENDED COMPLAINT" on the first page. If using the
17 court form complaint, Plaintiff must answer all the questions on the form in order for the action to
18 proceed. An amended complaint completely replaces the previous complaints. *See Lacey v.*
19 *Maricopa Cnty.*, 693 F.3d 896, 925 (9th Cir. 2012). Accordingly, Plaintiff must include in his
20 second amended complaint all the claims he wishes to present and all of the defendants he wishes
21 to sue, and may not incorporate material from the prior complaints by reference.

22 Failure to file a second amended complaint in accordance with this order in the time
23 provided will result in dismissal of this action without further notice to Plaintiff. The Clerk shall
24 include two copies of the court's complaint form with a copy of this order to Plaintiff.

25 **IT IS SO ORDERED.**

26 Dated: 9/27/2023

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HAYWOOD S. GILLIAM, JR.
United States District Judge